State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

March 12 thru March 14, 2024

State of New York Court of Appeals

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To be argued Tuesday, March 12, 2024

No. 29 Lelchook v Societe Generale de Banque au Liban SAL

In this federal case, Ester Lelchook and other plaintiffs are suing for damages on behalf of 22 United States citizens who were injured or killed in rocket attacks launched by the Hizbollah terrorist organization on civilian centers in Israel in 2006. They brought this action under the Anti-Terrorism Act of 1990 (ATA), 18 USC § 2333, against the Lebanese company Societe Generale de Banque au Liban SAL (SGBL) in the Eastern District of New York, claiming SGBL is liable for damages as successor to the Lebanese Canadian Bank (LCB), which is accused of providing extensive financial assistance to Hizbollah in the years leading up to the 2006 attacks. In 2011, SGBL acquired all of LCB's assets and liabilities for $580 million, a transaction the plaintiffs say left LCB insolvent, although it continues to exist for the purpose of defending itself in related litigation. In 2012, the U.S. Court of Appeals for the Second Circuit ruled in parallel litigation that LCB is subject to personal jurisdiction in New York for ATA claims arising from the 2006 attacks. The plaintiffs in this case argue that SGBL inherited LCB's jurisdictional status when it assumed all of LCB's liabilities in 2011.

U.S. District Court granted SGBL's motion to dismiss the suit for lack of personal jurisdiction, saying, "New York courts have held that short of a merger an asset acquisition is not sufficient to impute a target's jurisdictional status on an acquiror.... While SGBL may be liable for any liability it assumed in the [2011 transaction], that does not address whether SGBL is subject to jurisdiction in New York.... Plaintiffs have failed to allege any connection between SGBL and [New York], and have failed to allege that the two companies have merged such that SGBL is merely a continuation of LCB and so SGBL must answer for LCB's purported bad acts in this court."

The Second Circuit said New York law is not clear on this issue, explaining, "On one hand, New York Courts have firmly held that an asset purchase alone is insufficient to confer personal jurisdiction over a successor. On the other hand, New York courts have also held that in some circumstances a successor does inherit its predecessor's jurisdictional status, including when there is a merger. But New York courts have not squarely addressed a situation in which a successor acquires all of a predecessor's assets and liabilities, but does not do so through either a statutory merger or a transaction that meets established standards for a de facto merger."

The Second Circuit is asking this Court to resolve the jurisdictional issue by answering two certified questions: "1. Under New York law, does an entity that acquires all of another entity's liabilities and assets, but does not merge with that entity, inherit the acquired entity's status for purposes of specific personal jurisdiction? 2. In what circumstances will the acquiring entity be subject to specific personal jurisdiction in New York?"

For appellants Lelchook et al: Michael Radine, Manhattan (212) 354-0111
For respondent SGBL: Brian J. Leske, Boston, MA (617) 573-9400

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To be argued Tuesday, March 12, 2024

No. 30 Audthan LLC v Nick & Duke, LLC

In 2013, Audthan LLC entered into a long-term lease with Nick & Duke, LLC for property on 11th Avenue in Manhattan. The lease ran through March 2053 with an option to renew for another 48 years, and included an agreement that Audthan would develop a 58,000-square-foot mixed use building on the site that would revert to Nick & Duke at the end of the lease. Because the New York City Department of Housing Preservation and Development (HPD) had issued a finding of harassment against the property in 2009, barring any development of the site until the harassment finding was cured, the lease required Audthan to negotiate a cure agreement with HPD and required Nick & Duke to cooperate in good faith in effecting a cure. In December 2015, Audthan reached a proposed cure agreement (PCA) with HPD, which included building 15,000 square feet of low income housing on the site, but Nick & Duke refused to approve it. The landlord said it refused to consent because the PCA would require it to allow more low income housing than it had agreed to in the lease. Audthan, which had commenced a breach of contract action against Nick & Duke based on unrelated issues earlier in 2015, amended its complaint to assert a claim that the landlord breached the lease by refusing to approve the cure agreement and it moved for an order requiring the landlord to approve the PCA, which Supreme Court denied. Finally, after more litigation and four termination notices issued by the landlord, Nick & Duke declared in a June 2021 letter to HPD that it "will not, and will never, approve any version of a [cure agreement], because no cure is warranted in light of adjudicated harassment of tenants by" Audthan. In response, Audthan informed Nick & Duke that its declaration constituted a repudiation of the lease and that Audthan was treating the lease as terminated and surrendering possession effective July 30, 2021. It served a third amended complaint, including a breach of contract claim against the landlord based on a theory of repudiation. Supreme Court granted Nick & Duke's motion to dismiss the repudiation claim.

The Appellate Division, First Department affirmed on a 3-2 vote, saying, "Because the landlord's refusal to sign the PCA in 2021 was for the same reason it refused to sign the PCA in 2015, the June 4, 2021 statement that it would absolutely refuse to sign 'any' cure agreement is merely an extension of the same breach alleged in 2015. If the landlord is found not to have breached the lease in 2015, then its actions in 2021 do not constitute a separate breach of the lease, much less a repudiation. Moreover, because a party cannot repudiate a contract it has already breached, if the landlord is found to have breached the lease in 2015, there can be no repudiation in 2021...."

The dissenters said that "where an obligation is ongoing or serial in nature, a *subsequent* material breach can support a claim on a theory of repudiation notwithstanding earlier claims for partial breach.... [T]he tenant plausibly alleges that the landlord's unequivocal statement in its June 4, 2021 letter that it 'will not, and will never, approve any version of a' cure agreement was the point at which the tenant was denied the benefits of the lease. Stated differently, this unequivocal statement in the 2021 letter was different in kind from the earlier alleged conduct, and the tenant indeed alleges that the 2021 statement was a separate material breach" of the lease.

For appellant-respondent Audthan: Elan R. Dobbs, Manhattan (212) 953-6000
For respondent-appellant Nick & Duke: Jeffrey Turkel, Manhattan (212) 867-6000

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To be argued Tuesday, March 12, 2024

No. 31 Matter of Aaron Manor Rehabilitation and Nursing Center, LLC, v Zucker

Aaron Manor Rehabilitation and Nursing Center and more than 100 other for-profit nursing homes filed this suit against state Health Commissioner Howard A. Zucker to challenge his department's implementation of a 2020 amendment that eliminated a portion of the Medicaid payments for-profit facilities had been receiving for capital costs. The Commissioner previously had discretion to include a "residual equity reimbursement factor" in Medicaid payments to nursing homes that had exceeded their "useful facility life" of 40 years. On April 3, 2020, the legislature amended Public Health Law § 2808(20)(d) to provide, "Notwithstanding any contrary provision of law..., for rate periods on and after April [1, 2020], there shall be no payment factor for residual equity reimbursement in the capital cost component of Medicaid rates of payment for services provided by residential health care facilities." In August 2020, the Department of Health (DOH) notified the nursing homes of the elimination of residual equity reimbursements and informed them that their new reduced payments would apply retroactively to April 2020.

The nursing homes contended that DOH's application of the new rates was "improperly retroactive" in violation of Public Health Law § 2807(7), which requires DOH to notify facilities of new rates "at least [60] days prior to the beginning of an established rate period for which the rate is to become effective." They also argued, among other things, that DOH's reduction of their Medicaid payments violated Public Health Law § 2807(3), which requires it to determine whether new rates "are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities."

Supreme Court granted summary judgment to the nursing homes on the retroactivity issue, barring enforcement of the reduced rates as of April1, 2020. It said the "notwithstanding" clause of section 2808(20)(d) did not invalidate the 60-day notice requirement. The court dismissed the facilities' challenges to prospective application of the new rates.

The Appellate Division, Third Department affirmed, saying Public Health Law § 2808(20)(d) involves "the normal ratemaking process. Here, the Legislature elected to eliminate reimbursement of residual equity expenses for rate periods on and after April 1, 2020. There is no direct evidence or language that the Legislature intended a retroactive application of the ratemaking process." "[R]etroactive ratemaking is impermissible under Public Health Law § 2807(7)" and none of the statutory exceptions apply, it said, and because "the retroactive application of the rate would run counter to the 'general purpose of the prospective rate system[, which is] to permit [nursing homes] to conduct their operations in full reliance upon the rates certified by the commissioner'..., we find that retroactive enforcement of the equity elimination clause is not permitted."

DOH argues the Legislature clearly expressed its intent to eliminate the residual equity payments retroactively by mandating "elimination of the payment factor beginning two days before the statute was passed – a circumstance that on its face necessitated retroactive application of the statute;" and by directing immediate elimination of the payments "notwithstanding any contrary provision of law," which overrode the 60-day notice requirement. It says the Appellate Division decision "frustrates the statute's purpose, because it has prevented [DOH] from recouping millions of dollars in savings intended by the Legislature when it mandated the retroactive removal of the residual equity [payments] – an estimated $173 million through the end of 2022, with an additional $97.2 million estimated to be lost" in 2023.

For appellants Zucker (DOH) et al: Assistant Solicitor General Kate H. Nepveu (518) 776-2016
For cross-appellants Aaron Manor et al: F. Paul Greene, Rochester (585) 232-6500

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To be argued Tuesday, March 12, 2024

No. 32 Alcantara v Annucci

This lawsuit against state prison officials was filed in 2016 by Richard Alcantara and five other sex offenders who were held in a residential treatment facility (RTF) at the medium security Fishkill Correctional Facility after serving their prison sentences because they were unable to find housing that complied with the Sexual Assault Reform Act (SARA), which prohibited them from residing within 1,000 feet of a school. They claimed, among other things, that the Fishkill RTF failed to provide adequate educational and vocational programming – both within and outside of the Fishkill prison grounds – as required by the Correction Law.

Supreme Court granted partial summary judgment to both sides, ruling that education and rehabilitation programs within the Fishkill facility were adequate under the law, but the educational, vocational and reintegration opportunities offered outside the facility were not. The court said the Department of Corrections and Community Supervision (DOCCS) demonstrated "that the programs offered to RTF [residents] within the facility or on facility grounds are at least minimally adequate and do not violate DOCCS's obligations under the Correction Law," noting that residents participate in tailoring a rehabilitation program, are given a paid prison work assignment, and may also be assigned to educational programming for college or high school equivalency courses." But it declared that "DOCCS is failing to comply with its obligations ... to provide community-based programming and educational, vocational and employment opportunities in the communities outside the Fishkill Correctional Facility environs." It said Correction Law §§ 2(6) and 73(1) and (2) "reflect an unmistakable legislative intent to provide community-based programming for RTF [residents] in furtherance of the statutory objective to help them reintegrate into the community;" but the record "is clear and unequivocal that RTF [residents] are not permitted to leave facility grounds for employment and the vast majority of [them] have absolutely no opportunity for community-based 'employment, educational and training opportunities.'"

The Appellate Division, Third Department dismissed the entire complaint, reversing the judgment that DOCCs was required to provide programs outside the prison and failed to do so. It said "nothing in Correction Law § 73(2) or (3) states specifically where the opportunities provided in a rehabilitation program ... must be located. In other words, there is no statutory mandate providing that DOCCS's obligations under Correction Law § 73 be outside the confines of Fishkill.... Although it would seem that the purposes behind a rehabilitative program would be served by having such program or employment, training or education take place in the actual community and outside of an RTF, DOCCS is best suited to make this determination given its 'leeway to design its RTF programs and facilities'...."

For appellants Alcantara et al: Matthew Freimuth, Manhattan (212) 728-8000
For respondents Annucci et al: Assistant Solicitor General Blair J. Greenwald (212) 416-6102

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To be argued Tuesday, March 12, 2024

No. 33   People v Melvin Baez

Melvin Baez was stopped by police in Queens for driving while using his cell phone in February 2014, and was then arrested on suspicion of driving while under the influence of marijuana. During the arrest and search of his person, Officer Shuyi Lin recovered a torn plastic bag that had fallen from Baez's jacket pocket to the ground. A white substance in the bag was tested by the police laboratory and found to be cocaine.

Baez, who represented himself at his bench trial on drug charges, challenged the legal sufficiency of the chain of custody of the drug evidence based on the varied descriptions of it provided by police officers and the lab technician who had custody of the evidence. The second arresting officer, Mark Lewis, described it in the arrest report as one bag of crack cocaine, in the felony complaint as two bags of crack that weighed more than four ounces, and in the property voucher as two clear plastic bags each containing nine grams of crack. Officer Lin testified at trial that when she recovered the torn plastic bag during the arrest some of the contents were spilling out, so she put it into a latex glove, placed it in a narcotics envelope and left it at the precinct, telling Officer Lewis where to find it when he returned. Officer Lewis said he found the envelope where he was told it would be and put it into a manilla narcotics envelope, which he sealed and locked in the precinct's narcotics safe. The lab technician testified that the evidence envelope she received was in a "signed and sealed condition" and contained an undamaged Ziploc bag of cocaine weighing 5.35 grams and a second undamaged Ziploc holding 45 glassine bags and some residue, which she did not test.

Supreme Court dismissed Baez's motion to dismiss the indictment without discussing his specific allegations. The court convicted him of criminal possession of a controlled substance in the fourth degree and sentenced him to seven years in prison.

The Appellate Division, Second Department affirmed. "Viewing the evidence in the light most favorable to the prosecution..., we find that it was legally sufficient to establish the chain of custody of certain drugs after they were recovered and vouchered into police custody. The testimony of the police witnesses provided '"reasonable assurances of the identity and unchanged condition" of the evidence,'" it said, citing <u>People v Julian</u> (41 NY2d 340 [1977]).

Baez relies heavily on <u>Julian</u>, which held that in a "white powder" case such as this, the prosecution "must establish, first, that the evidence is identical to that involved in the crime; and, second, that it has not been tampered with." He argues that "in light of the contradictory accounts" and descriptions of the weight and packaging of the drug evidence, "the People failed to provide reasonable assurances that the substance [the police lab] tested and analyzed was the same substance that Officer Lin allegedly recovered in this case."

For appellant Baez: Harold V. Ferguson, Jr., Manhattan (212) 577-3548
For respondent: Queens Assistant District Attorney Christopher J. Blira-Koessler (718) 286-6000

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To be argued Wednesday, March 13, 2024

No. 34 Matter of Walt Disney Company v Tax Appeals Tribunal of New York State
No. 35 Matter of International Business Machines Corp. v Tax Appeals Tribunal of NYS

Walt Disney Company and its consolidated subsidiaries, and International Business Machines Corporation and its combined affiliates, contend that the application of former Tax Law § 208(9)(o) by New York tax authorities to deny their exclusion of royalty income from their corporate franchise tax returns violated the dormant Commerce Clause of the U.S. Constitution. The statute, which was repealed in 2013, required corporations that paid royalties to affiliates within their corporate group to add back those payments to their New York net income for calculating their franchise tax. To avoid taxing both affiliates on the same royalties, the statute allowed affiliates that received royalty payments to deduct them from their own net income "unless such royalty payments would not be required to be added back" by the affiliate that paid them.

In these cases, the state Department of Taxation and Finance determined that the Disney companies and IBM companies improperly deducted royalty payments they received from affiliates in foreign countries that were not subject to New York franchise taxes and, so, were not required to add those payments back on a New York tax return. The Tax Department assessed Disney for an additional $3.9 million in franchise taxes for the tax years 2008 through 2010; and assessed IBM for an additional $64.6 million for 2007 through 2012. The state Tax Appeals Tribunal upheld the assessments in both cases, ruling that a corporation could deduct royalties it received from a related affiliate only if that affiliate was subject to tax in New York. In separate appeals, Disney and IBM argued that the determinations denying their royalty deductions violated the dormant Commerce Clause by discriminating against interstate and foreign commerce.

The Appellate Division, Third Department upheld the Tribunal's determinations in both cases. In Disney, it said there was no discrimination because "the reason why petitioner would be permitted to deduct such royalty payments from its income, if its affiliates were New York taxpayers, is because the affiliate would be paying taxes on that income.... Thus, such royalty income tax would be paid by either the taxpayer or its affiliate – not both. Since similarly situated entities would also be paying taxes on the royalty income once in either scenario, whether or not such commerce is from an out-of-state source, petitioner has failed to show differential treatment between in-state and out-of-state economic interests that rises to the level of unconstitutional discrimination." In IBM, it rejected the corporation's claim that the tax scheme failed the internal and external consistency tests by unfairly apportioning taxes in violation of the Commerce Clause.

For appellant Disney: Marc A. Simonetti, Manhattan (212) 858-1000
For appellant IBM: Jeffrey A. Friedman, Washington, DC (202) 383-0718
For respondents Tribunal et al: Asst. Solicitor General Frederick A. Brodie (518) 776-2317

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To be argued Wednesday, March 13, 2024

No. 36 Morrison v New York City Housing Authority

In May 2018, Gregory Morrison took an elevator to the sixth floor of the Baruch Houses in Manhattan to visit a friend. He decided to take a stairway down, but slipped and fell on the top step and seriously injured his knee, which required two surgeries. He brought this personal injury action against the New York City Housing Authority (NYCHA), the owner of the building, alleging that it negligently allowed liquid to accumulate in the stairwells. He said he did not see any liquid on the stairs, but he stepped on "something slippery" when he fell.

After discovery, NYCHA moved for summary judgment dismissing the suit, contending the evidence did not establish that it created or had prior knowledge of a slippery condition on the stairs. A NYCHA building inspection report dated 14 days before Morrison's accident, and three prior inspection reports, noted that "steps & treads" in the building were "unsat[isfactory]," but did not identify which stairways it referred to nor specify the nature of the unsatisfactory condition. NYCHA's janitorial work schedule required its staff to clean the stairs once a week, and to inspect the stairways every morning and report any hazardous conditions to a supervisor.

Opposing the motion, Morrison submitted the affidavit of a professional engineer he retained to investigate the cause of the accident. The engineer said the stairway where Morrison fell had a "coefficient of friction" – when wet – that did not meet industry standards, which he said was consistent with NYCHA's inspection reports describing the stairs treads as unsatisfactory. The engineer concluded that "NYCHA was negligent in allowing their stairway to be dangerously slippery by having [an] inadequate coefficient of friction."

Supreme Court dismissed the suit, saying NYCHA demonstrated its lack of notice of a hazardous condition and Morrison failed to raise a question of fact "because he improperly tried to introduce a new theory of liability through the opinion of his expert."

The Appellate Division, First Department affirmed, saying NYCHA demonstrated "that it did not have constructive notice of the alleged condition" and Morrison "failed to raise an issue of fact, as the building inspection reports neither indicate specific staircases or floors with unsatisfactory conditions nor set forth the specific nature of the unsatisfactory condition." It said, "Although plaintiff's expert did not, as ... the court found, raise a new theory of negligence regarding the claim of inadequate coefficient of friction; the expert nonetheless failed to raise an issue of fact to rebut defendant's prima facie showing that it neither created nor had notice of the transient condition of a wet or slippery substance at the specific incident location and that it followed a proper and reasonable inspection and cleaning schedule."

Morrison argues the Appellate Division improperly "construed the facts in the light least favorable to Morrison," the non-moving party, "while failing to recognize that an issue of fact existed as to whether NYCHA's application of paint to the treads caused inadequate friction coefficiency under wet conditions in violation of ASTM and UL standards." He says the lower court based its ruling on "contradictory proof" from NYCHA: "inspection records that not only failed to eliminate issues of fact but, conversely, supported inferences that it had actual knowledge of a dangerous condition in its staircase."

For appellant Morrison: Si Aydiner, Mineola (212) 471-5108
For respondent NYCHA: Diana Neyman, Manhattan (212) 732-2000

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To be argued Wednesday, March 13, 2024

No. 37 Russell v New York University

Suzan Russell was an adjunct faculty member at New York University (NYU) in March 2015, when she commenced an employment discrimination action in federal court in the Southern District of New York against the university and two of its professors. Russell, a Jewish woman who is gay and over the age of 40, claimed she was harassed by the professors beginning in 2013 via mail, email and online posts targeting her gender, age, religion and sexual orientation. She alleged that she received unsolicited mail including an AARP membership invoice, a "Healthy Aging" newsletter, a copy of the Koran, information on converting to Christianity, and materials related to heart conditions and arthritis, urinary incontinence pads, vaginal lubricants, and pornographic depictions of same-sex encounters, among other things. U.S. District Court referred her case to mediation in September 2015, but no resolution was reached. One month later, in October 2015, NYU terminated her employment for the stated reason that she had contacted a professor who was a potential witness in the federal case, in violation of a confidentiality order from the District Court. Russell then amended her federal complaint to add a retaliation claim based on her termination.

In July 2017, U.S. District Court dismissed Russell's federal claims on the merits. The U.S. Court of Appeals for the Second Circuit affirmed.

While her Second Circuit appeal was pending, Russell commenced this action in State Supreme Court asserting claims for discrimination, hostile workplace, and retaliation against NYU and the professors under the New York State and New York City Human Rights Laws, based on the same factual allegations as in the federal action.

Supreme Court dismissed the suit, finding that Russell's State and City Human Rights Law claims were barred by the doctrine of collateral estoppel based on the factual determinations of the federal courts..

The Appellate Division, First Department affirmed in a 3-2 decision. The majority said, "In light of the particular express facts that the federal courts found were conclusively demonstrated by the record on the summary judgment motions before the district court; the nature of the allegations underlying plaintiff's State and City Human Rights Law claims in this action and the manner in which plaintiff has litigated those claims; and the relevant collateral estoppel case law..., we conclude that, even affording the City Human Rights Law claims the liberal analysis to which they are entitled, plaintiff's claims under both the State and City Human Rights Laws were properly dismissed under the doctrine of collateral estoppel."

The dissenters argued the retaliation claim under the City Human Rights Law (HRL) should be reinstated against NYU. "Viewing the record presented to the federal courts in the light most favorable to plaintiff, I would hold that the temporal proximity between the failed mediation and plaintiff's termination, by itself, suffices to support a finding of a causal relationship for purposes of plaintiff's City HRL retaliation claim. This is a crucial distinction from the outcome reached by the federal courts, which, in applying federal law, held that any causal inference would be too weak to rebut the facially nondiscriminatory reason proffered by defendants for plaintiff's termination, i.e., her violation of the Federal confidentiality order. Since invidious reasons may not form any part of an employment action under the City HRL, these factors alone raise issues of fact as to whether plaintiff's termination was effected, at least in part, in retaliation for her decision to continue the prosecution of her Federal discrimination claims."

For appellant Russell: Avram S. Turkel, Manhattan (212) 575-7900
For respondents NYU et al: Joseph C. O'Keefe, Manhattan (212) 969-3000
For respondents Thometz and Meltzer: David M. Alberts, Manhattan (212) 483-9490

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To be argued Wednesday, March 13, 2024

No. 38   People v David Williams

An undercover police officer (UC 322) bought $40 worth of heroin through an intermediary, Todd Elfe, during a buy-and-bust operation in upper Manhattan in December 2016. UC 322 did not meet the seller face-to-face, but said he followed "several feet" behind Elfe and the dealer as they walked along First Avenue near 115th Street, far enough away that he could not hear what they said to each other. After Elfe handed him three glassines of heroin, UC 322 reported to his support team that the "actual dealer" was wearing black pants, a white sweater and a black hat, but did not otherwise describe him. David Williams was arrested nearby minutes later, and UC 322 made a confirmatory identification of Williams as the seller in the precinct parking lot half an hour after the arrest.

At a pretrial hearing, UC 322 testified about his observations during the buy-and-bust and his confirmatory identification of Williams at the precinct after the arrest; and the arresting officer testified about her basis for making the arrest and the circumstances of UC 322's confirmatory identification.. Supreme Court ruled the police lacked probable cause to arrest Williams based on its finding that the arresting officer's testimony was unreliable and "tailored to meet constitutional muster." It suppressed the confirmatory identification and the physical evidence recovered from Williams as tainted by the illegal arrest.

The court denied Williams' request for an independent source hearing to determine whether UC 322 had a sufficient opportunity to observe the seller during the drug transaction to make an in-court identification of Williams admissible, untainted by the illegal arrest and post-arrest identification. It said a separate hearing was not necessary because UC 322's testimony at the probable cause/suppression hearing "demonstrates clear and convincing evidence 'that the undercover's observations before and during the alleged sale provided an independent source for' an in-court identification of Defendant at trial." After UC 322 identified him at trial, Williams was convicted of third-degree criminal sale of heroin and sentenced to six years in prison.

The Appellate Division, First Department affirmed, saying "the hearing court providently exercised its discretion in denying defendant's request for a separate independent source hearing. At the suppression hearing, the undercover officer and an officer present at the identification procedure testified. There was detailed testimony about the undercover officer's ample opportunity to observe defendant at the time of the drug sale, and a description of the standard confirmatory identification that was sufficient to permit the court to make its finding. Accordingly, the officer was properly permitted to identify defendant in court."

Williams argues the trial court violated his due process rights by "denying [him] the opportunity to challenge evidence of an independent source for UC 322's in-court identification." He says the court denied his motion "without hearing the parties' arguments on the question of independent source, without notifying the parties that it would make that determination on the basis of the Dunaway record, and without considering the potential 'causal connection' between the arrest, the precinct identification, and the officer's in-court identification.... UC 322 never testified that he had noticed the seller's facial characteristics, race, height, weight, or hairstyle. The parties never inquired as to those facts, or litigated independent source at all, because the Dunaway hearing was 'limited to the issue of whether there was probable cause [for] arrest.'"

For appellant Williams: Carola M. Beeney, Manhattan (212) 577-2523
For respondent: Manhattan Assistant District Attorney Brent E. Yarnell (212) 335-9000

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To be argued Thursday, March 14, 2024

No. 40   People v Yasif Sims

Facing three felony charges stemming from his involvement in a drug trafficking ring in St. Lawrence County in 2016-17, Yasif Sims agreed to a plea bargain in which he would plead guilty to one count of criminal possession of a controlled substance in the second degree in exchange for a six-year prison sentence. County Court imposed a condition that, until the sentencing, "you have got to comply with the jail rules. You break the jail rules, get involved in a fight, promote some contraband..., disrespect the corrections officers, whatever it may be, I am no longer bound" by the agreement and could sentence him to up to 14 years. Defense counsel informed the court that Sims was reluctant to accept the condition because jail guards had threatened to write him a disciplinary ticket if he pled guilty. The court then clarified the condition, saying, "Simply because a jail ticket is written doesn't mean that you are going to lose the benefit of your bargain. What is going to happen, if you get in trouble, is they are going to send me the information. I'm going to take a look at it" and defense counsel "is going to get a chance to address it.... [I]f it turns out ... that you got in a fight with another inmate..., well, then, I'm going to look at that and say, you lost your right to the commitment. But, if it is something close, I'm going to take a look at it." Sims accepted the condition and pled guilty as agreed.

As soon as he was returned to jail that day, guards issued him tickets charging four infractions. A disciplinary board found him not guilty of two infractions, but guilty of two others: verbal harassment and disrespecting facility staff. He received no more tickets for the next four months. At sentencing, defense counsel asked the court to abide by the sentencing agreement, arguing that Sims's alleged conduct did not violate the plea condition as clarified by the judge. "[T]he example the court gave ... was a serious misconduct of getting in a fight with another inmate or punching someone...," he said. "While I understand it is the court's position that that was illustrative," Sims's infractions did not involve "any sort of violence towards a corrections officer." The court concluded it was not bound by its sentencing commitment and sentenced Sims to seven years in prison.

The Appellate Division, Third Department affirmed, saying "County Court made clear that a condition of the plea was that he 'comply with the jail rules' by, among other things, respecting the correction officers and that, if he failed to do so, the court would no longer be bound by the promised sentence." It said the court heard from defense counsel and Sims on the jail infractions and the plea condition, and found that "the court conducted a sufficient inquiry before determining that there was a legitimate basis for the charges."

Sims says he "remains in prison despite a clear violation of his due process rights. His plea and sentence should be vacated. At a minimum, the plea agreement should be enforced and his sentence immediately reduced to six years." He argues, among other issues, that the disparity between the court's clarification of the plea conditions and its determination that he violated those conditions, "based on unsworn, unsigned, and uncorroborated hearsay allegations" by jail guards, rendered his plea involuntary.

For appellant Sims: Noreen McCarthy, Keene Valley (518) 626-1272
For respondent: Assistant Attorney General James F. Gibbons (212) 416-6173

State of New York Court of Appeals

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To be argued Thursday, March 14, 2024

No. 41 People v Kenneth E. Fisher

Kenneth Fisher's trial on drug charges in Chemung County Court began on a Monday with jury selection. When the jury began its deliberations three days later, it sent the judge a note that read, "Confidential, one juror feels she may have been followed home Monday by Mr. Fisher." The court determined the note referred to Juror No. 6 and held an inquiry, with Fisher and both attorneys present. Juror No. 6 said she believed he had followed her home "Because I could see him in my rearview mirror." He was in a maroon Lincoln, "an older model," she said, and "may have been six or eight car lengths behind me." She said she was "95 percent" certain the driver was Fisher. When the court asked, "Is there a reason why you are bringing this up to us now...?," she replied, "Because other juror members were scared for their own safety, because of certain people that were sitting watching the trial through the week." The court then asked if she could be fair and impartial. She replied, "I can be a fair and impartial juror, yes. I say that, because the other juror members encouraged me, because their safety may be at risk." After conferring with Fisher, defense counsel moved for a mistrial on the ground that Juror No. 6 was grossly unqualified to serve. He raised concerns about her delayed disclosure, said she appeared to still believe that Fisher had followed her home, and said her statements that she only came forward because other jurors feared for their own safety suggested a possible racial bias among the jurors. The court denied the motion, relying on Juror No. 6's statement that she could be fair and impartial, but granted defense counsel's request that it question the other jurors. They raised more generalized concerns that "you're dealing with drug dealers" and "there's always a drug ring, there's always somebody looking out for the other guy," but all of them assured the court that they could be fair and impartial. Fisher was convicted of three counts third-degree criminal sale of narcotics, acquitted of two possession counts, and sentenced to nine years in prison.

The Appellate Division, Third Department affirmed on a 3-2 vote, saying the trial court conducted the required "probing and tactful inquiry" before finding Juror No. 6 was not grossly unqualified. "County Court was in the best position not only to assess the juror's oral assertions but also her demeanor – which cannot be assessed via perusal of a trial transcript," the majority said. "Moreover, we recognize that in questioning the juror, the trial court walks a fine line and must 'avoid tainting a jury unnecessarily. In this endeavor, sometimes less is more....' [D]eferring to County Court's ability to observe the jury and assess juror No. 6's state of mind..., we cannot say [its] denial of defendant's motion for a mistrial constituted an abuse of discretion."

The dissenters said the trial court failed to conduct a proper inquiry. "The court observed that the Monday incident probably did not happen, but juror No. 6 clearly thought otherwise.... In response, the court inquired as to the reason for the late disclosure, only to learn that other jurors had safety concerns. Disregarding that factor, the court further concluded that juror No. 6 could be fair and impartial, ignoring her explanation that she could be fair 'because the other juror members encouraged [her], because their safety may be at risk.' That extraordinary qualifier necessitated further inquiry by the court, but there was none.... The operative point here is not what the court thought about the Monday incident, but whether and to what extent that experience affected juror No. 6's state of mind in her deliberations, not to mention the impact on the other jurors."

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To be argued Thursday, March 14, 2024

No. 42 People v Corey Dunton

Corey Dunton was 16 years old in November 2013, when he tried to steal a jacket from a 17-year-old skater in Manhattan's Bryant Park. The skater resisted and Dunton shot at him five times, wounding him. One of the shots struck a 14-year old bystander, paralyzing him from the waist down. Dunton was charged in a seven-count indictment with second-degree attempted murder and related charges. He spent three years awaiting trial at Rikers Island, where he repeatedly engaged in altercations including violence against correction officers. The trial judge took note of several of these incidents and warned Dunton that if his out-of-court misbehavior prevented him from appearing, the trial would proceed without him, but also observed that he had been "a gentleman in the courtroom."

When the jury concluded its deliberations, the court had Dunton remain handcuffed for the reading of the verdict. Dunton remained quiet as the foreperson read the jury's guilty verdicts on the first five counts, then he laughed. After the foreperson read the guilty verdict on the sixth count, he interjected: "You thought that was gonna break me? I don't care about sentencing.... Y'all didn't break me." The court told defense counsel to "control your client," but Dunton continued, "I'm good. You all didn't break me. Give me the whole 50 years.... All 12 of y'all can sit there and say you all did the right thing. That's what I want y'all to know. Live with that." The court ordered the officers to "take charge" while Dunton said, "Live with that.... What y'all done ain't gonna break me. You ain't gonna see me cry. I'm walking out the same way I came in, immaculate," and ended with a vulgar suggestion. After he was removed from the courtroom, the foreperson read the guilty verdict on the seventh count and the jury was polled, confirming its verdict. Dunton was sentenced to 25 years in prison. The Appellate Division, First Department affirmed on direct appeal.

Two years later, Dunton moved for a writ of error coram nobis, contending that his attorney provided ineffective assistance of counsel by failing to argue that the trial court violated his right to be present at trial when it removed him, without warning, before the entire verdict had been read and the jury polled. The Appellate Division granted the motion and ordered a new trial. "By failing to issue the requisite warning, the trial court violated defendant's Sixth Amendment rights" and state statutes, it said. "Here, there is no evidence that defendant engaged, or even threatened to engage, in any violent behavior in the courtroom prior to his removal.... Other warnings given by Supreme Court did not satisfy the court's responsibilities ... because they were based upon defendant's actions outside of the courtroom and did not address removal." It said appellate counsel had no strategic reason for not raising the issue on direct appeal.

The prosecution argues that Dunton's ejection "was fraught with enough factual and legal difficulties that appellate counsel cannot be said to have been constitutionally ineffective in declining to raise it," saying counsel could have believed the trial judge "properly exercised his discretion" to "protect those in the courtroom – particularly jurors ...– from not just harm and threatening behavior, but also any sort of undue influence." Counsel could have reasonably thought that any violation was harmless, since only the seventh guilty verdict remained to be read, it says; and "appellate counsel was not ineffective for choosing to press other, more comprehensive claims. The claims that counsel did present on appeal had the added virtue of focusing on alleged police or prosecutorial misconduct, rather than on defendant's violent and intransigent behavior."

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To be argued Thursday, March 14, 2024

No. 39 People v Cid C. Franklin

In May 2016, a driver told police that another driver had just brandished a handgun at him during a traffic dispute in Queens and gave them the driver's plate number. Officers traced the plate to a house on 168th Street, where the vehicle was registered, and found Cid Franklin outside the house, which belonged to his stepmother. Franklin ducked into the basement and locked the door. Officers arrested him soon after when he came out the front door. They searched the basement, with the owner's permission, and recovered a loaded .25 caliber pistol. Franklin was charged with weapon possession. That same night, a Criminal Justice Agency (CJA) employee interviewed him at Queens Central Booking about his background, employment, financial resources and community ties in order to complete a "CJA form," which is submitted to arraignment courts with recommendations on pretrial release. Franklin told the CJA interviewer he had lived in his stepmother's basement for three years.

At trial, seeking to establish that Franklin resided in the basement where the handgun was found, the prosecution moved to admit the CJA form into evidence through testimony of a CJA supervisor who had not interviewed Franklin or prepared the form. Franklin objected that admitting the CJA form through an employee who did not create it would violate his right to confront witnesses under the Sixth Amendment and Crawford v Washington (541 US 36). Supreme Court admitted the CJA form under the business records exception to the hearsay rule and overruled Franklin's Crawford objection, saying "there is no Crawford violation in that this was not made specifically for prosecution purpose.... [T]his is made as an aid to the Judge to [decide] if any bail should be set at arraignments." Franklin was convicted of second-degree criminal possession of a weapon and sentenced to four years in prison.

The Appellate Division, Second Department reversed the conviction and ordered a new trial. "A statement is testimonial even where it is 'inculpatory only when taken together with other evidence' or made by a non-accusatory witness.... Here, the testimony of the CJA employee and the CJA form were admitted in order to establish an essential element of the charges..., in violation of the defendant's right of confrontation.... The defendant was never given the opportunity to cross-examine the CJA employee who prepared the CJA form, and, in admitting the CJA form through an employee who did not prepare the form, the Supreme Court failed to ensure that the defendant's Sixth Amendment right of confrontation was protected."

The prosecutors concede the CJA form provided the only direct proof that Franklin lived in the basement, but argue the form is not testimonial. "CJA is not a law enforcement agency – it is a nonprofit organization funded by the City of New York – and its aims are not investigatory or prosecutorial. Indeed, CJA employees do not ask defendants about the crimes of which they are accused. Perhaps inevitably, though, sometimes information that a defendant provides during the CJA interview ... becomes useful to a criminal prosecution.... As the trial judge ... correctly recognized, defendant's [CJA] interview did not serve prosecutorial or investigatory ends – quite to the contrary, the purpose of these interviews is to minimize unwarranted pre-trial detention – accordingly, the statements defendant made during it were not testimonial." They also say Franklin "was the declarant for Confrontation Clause purposes, rather than the CJA employee who interviewed him and then transcribed his responses. And ... a criminal defendant has no Sixth Amendment right to confront himself."

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